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CARLOS E. KEPKE
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
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12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 CARLOS E. KEPKE,
16 Defendant.
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Case No. 3:21-CR-00155-JD

**CARLOS KEPKE'S REPLY IN
SUPPORT OF THE MOTION TO
EXCLUDE, OR IN THE
ALTERNATIVE, TO LIMIT CERTAIN
OPINIONS AND TESTIMONY OF
AGENT JAMES OERTEL**

Date: October 17, 2022
Time: 10:30 a.m.
Courtroom: 11, 19th Floor
Judge: Hon. James Donato

1 Mr. Kepke filed this motion because the government’s disclosures failed to clearly identify
 2 to what extent, if any, the government intended to use Agent Oertel as a conduit for hearsay witness
 3 testimony, or to render opinions based on evidence that had not been properly authenticated or
 4 admitted, or to provide improper legal conclusions. Additionally, Mr. Kepke requested that the
 5 Court direct the government to produce promptly—at the latest before October 24, 2022—all
 6 Federal Rule of Evidence 1006 (“Rule 1006”) materials related to Agent Oertel’s testimony.

7 The government responded by clarifying that (1) Agent Oertel’s testimony will not be
 8 based upon hearsay but upon “evidence admitted at trial, including IRS records, financial records,
 9 witness testimony, and summaries of voluminous evidence as defined by Rule 1006,” and (2) that
 10 he “will not offer any opinion about whether Smith should have reported the income in question”
 11 or “any opinions about Defendant’s state of mind” in short, that he would not be asked to render
 12 any legal opinions. Government’s Opposition at 2-4. The government also stated that it did not
 13 oppose providing drafts of the summaries before October 24, 2022. *Id.* at 4.

14 The government’s commitments resolve Mr. Kepke’s objections to Agent Oertel’s expected
 15 trial testimony, although Mr. Kepke reserves the right to object should the government’s
 16 questioning stray outside the clear and bright lines the prosecutors have demarcated for themselves.
 17 As for Mr. Kepke’s request for Rule 1006 materials, given the government’s position that it does
 18 not oppose providing drafts of the summaries before October 24, 2022, but that final versions will
 19 not be ready “until shortly before they are offered because they will incorporate evidence admitted
 20 at trial,” Mr. Kepke requests that the government be ordered to produce (1) drafts by no later than
 21 October 17, 2022 – one week before the parties’ Pretrial Conference Statement is due – and (2) that
 22 the government produce final copies as soon as they are ready.

23 Respectfully submitted,

24 Dated: August 26, 2022

25 By: /s/ Grant P. Fondo
 26 GRANT P. FONDO
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 GOODWIN PROCTER LLP

27 Attorney for Defendant:
 28 CARLOS E. KEPKE

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **August 26, 2022**. I further certify that all participants in the case are registered CM/ ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **August 26, 2022**.

/s/ Grant P. Fondo
GRANT P. FONDO